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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 682

CONSTANT G. TUFFANELLI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEFS IN SUPPORT THEREOF.

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THE BURTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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CONSTANT G. TUFFANELLI,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Constant G. Tuffanelli, petitioner, prays that a writ of certiorari be issued by this Honorable Court to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in case No. 8037, entered by the said court on December 9, 1942, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

Opinions Below.

The trial court filed no opinion. The opinion of the Circuit Court of Appeals (R. 146-150), and an opinion of one of the Justices dissenting in part (R. 146-150) have not been published at this date.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 9, 1942. (R. 153.) Petitioner filed a petition for rehearing which was denied on December 28, 1942. (R. 154.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether several defendants may be convicted in a single indictment, for substantive offenses committed by them independently of each other, where such facts do not appear in the indictment but are disclosed for the first time at the trial, by the Government's evidence.

2. Whether several defendants can be convicted of a conspiracy "to commit the offenses charged in the preceding counts of this indictment" which offenses were substantive crimes committed by them independently of each other, where such facts do not appear in the conspiracy count but are disclosed for the first time at the trial, by the Government's evidence.

3. Whether, where the foregoing misjoinder of defendants and offenses exists, the trial court should not charge the Government with the burden of clear demonstration that no prejudice has resulted to the defendants, rather than to require of the defendants that they show no prejudice was visited upon them, because of the error.

4. Whether the petitioner can be convicted of violating Section 2833 of Title 26, U. S. C. A. which makes it a crime for any person to carry on the business of a distiller without having given a bond, where the evidence discloses the seizure of a set-up still by government agents but there is

no evidence that there was any mash or materials for the manufacture of distilled spirits on the premises at the time of the seizure of the still, or at any other time and there is no evidence of the sale of any distilled spirits manufactured at, or sold or delivered at or from the said still; in other words, does the foregoing situation constitute "carrying on" of the business of a distiller?

5. Whether an illegal amendment of an indictment is not made by a trial court who withholds an indictment from a jury during its deliberation because certain counts thereof have been dismissed, but who gives to the jury written slips of paper purporting to set forth the remaining charges in the indictment, which description of the charges vary materially from the allegations of the indictment.

Statutes Involved.

The statutes involved are:

U. S. C. A., Title 18, sec. 88 (Criminal Code, sec. 37).

U. S. C. A., Title 26, sec. 2810 (Internal Revenue Code, sec. 2810a).

U. S. C. A., Title 26, sec. 2833 (Internal Revenue Code, sec. 2833a).

U. S. C. A., Title 26, sec. 1441a (Internal Revenue Code, sec. 3321a).

They appear in the appendix, p. 27.

STATEMENT OF THE CASE.

The petitioner and a number of other defendants were indicted in a presentment containing ten counts. (R. 2-10.) Prior to the trial, the Government moved to dismiss Counts 4, 6 and 9, which motion was allowed by the court.

Count 1 charged that the petitioner, Walter Bonarski, Stephen Ostrowski, Frank Ptaszynski and others (not placed on trial) did, on, to-wit: July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, wilfully and feloniously have in their possession a still set up for the purpose of distilling alcohol, which still was not then and there registered as required by law.

Count 2 charged that the same defendants, on, to-wit: July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, feloniously carried on the business of a distiller of alcoholic spirits without having given a bond, as required by law.

Count 3 charged that the same defendants, on, to-wit: July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, feloniously carried on the business of a wholesale liquor dealer without having paid the special tax required by law.

Count 5 charged that the same defendants, on, to-wit: July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, unlawfully removed 435 gallons of alcohol in respect to which a tax was then and there imposed, with intent to defraud the United States of such tax.

Count 7 charged that the same defendants, on, to-wit: May 24, 1940, at Chicago, Illinois, unlawfully removed 415 gallons of alcohol in respect of which a tax was then and there imposed, with intent to defraud the United States of such tax.

Count 8 charged that the same defendants, on, to-wit:

June 12, 1940, at Chicago, Illinois, unlawfully removed 100 gallons of alcohol in respect of which a tax was then and there imposed, with intent to defraud the United States of such tax.

Count 10 charged that the same defendants, from, to-wit: January 1, 1939 up to and including July 15, 1940, conspired with each other and with unknown persons to commit "the offenses charged against the said defendants in the preceding counts."

Previous to the retirement of the jury to consider its verdict the court ordered that Counts 1, 2 and 5 be *nolle prossed* as to Bonarski and Ostrowski and that Count 5 be *nolle prossed* as to this petitioner. (R. 115.)

The jury found the petitioner guilty as to Counts 1, 2, 3, 7, 8 and 10. They found the defendants, Bonarski and Ostrowski, guilty on Counts 3, 7, 8 and 10. (R. 113.) The Court sentenced Tuffanelli and Bonarski on the aforesaid respective Counts.

At the conclusion of the Government's case, the defendants moved the Court to instruct the jury to find them not guilty on Counts 1, 2, 3, 7 and 8 on the ground that the evidence showed a misjoinder of offenses and of defendants. (R. 86, 114.) The motion was denied on all Counts as to the defendant, Tuffanelli. (R. 86, 87.) On motion of the Government an order of *Nolle Prosequi* was entered by the Court as to the defendants, Bonarski and Ostrowski, on Counts 1 and 2, and as to the defendant, Ptaszynski, on Counts 1, 2, 7, 8 and 10.

Thereupon the defendants moved the Court to require the Government to elect upon which of the remaining Counts of the indictment it would proceed against the several defendants and as ground therefor argued that the evidence disclosed a misjoinder of offenses and a misjoinder of defendants in these several Counts; these motions of the defendants were denied and thereupon Government counsel

stated that the Government elected to proceed against Tuffanelli on Counts 1, 2, 3, 7, 8 and 10; against Bonarski and Ostrowski on Counts 3, 7, 8 and 10; and against Ptaszynski on Count 3. (R. 87.) At the conclusion of all the evidence, Count 3 was dismissed as to Ptaszynski on motion of the Government.

Thus, at the conclusion of the evidence it appears that although all defendants were charged jointly with all of the offenses, the Government confessed by its action in moving for orders of *Nolle Prosequi* that Bonarski and Ostrowski should not have been joined in Counts 1 and 2 and that Ptaszynski should not have been joined in any Count.

The Government introduced no evidence whatever that Bonarski, Ostrowski and Ptaszynski had committed the offenses described in Counts 1 and 2; the setting up of a still and engaging in the business of a distiller without giving the required bond. There was no evidence connecting Tuffanelli with the charges described in Counts 3, 7 and 8. There was no evidence connecting Bonarski with Count 8. There was no evidence connecting Ptaszynski with any of the Counts.

There was no evidence whatever to prove the allegations of Count 2 charging the defendants with carrying on the business of a distiller at 2332 West Grove Avenue, Blue Island, Illinois, without having given a bond.

The only evidence introduced with respect to this Count was the seizure of a set-up still at that address. (R. 79.) No materials of any kind were found, no finished products and no mash. No evidence of the manufacture of distilled spirits at this address, and no evidence of the sales of any distilled spirits from or at this address, was given at the trial. (R. 79.)

At the conclusion of all of the evidence the Court stated that it would not send the indictment to the jury room

and asked Government counsel to prepare certain slips apprising the jury that the petitioner is charged with violating the criminal laws as to Counts 1, 2, 3, 7, 8 and 10 and that the defendants Bonarski and Ostrowski were charged with violation of the law in Counts 3, 7, 8 and 10. Government counsel prepared and handed to the Court written slips as to Counts 1, 2 and 3, as follows:

"Count 1 charges that the defendant, Constant G. Tuffanelli, was in possession of an unregistered still set up, for the purpose of distilling alcohol. This Count is based upon the statute of the United States which imposes a penalty on every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not * * * registered.

"Section 1162, Title 26, U. S. C. A.

"Section 2810(a), Internal Revenue Laws."

"Count 2 charges that the defendant, Constant G. Tuffanelli, unlawfully carried on the business of a distiller, for the purpose of distilling alcoholic spirits, without having given bond, as required by law. This Count is based upon the statute of the United States which imposes a penalty on any person who shall carry on the business of a distiller without having given bond, as required by law, * * *.

"Section 1184, Title 26, U. S. C. A."

"Section 2833(a), Internal Revenue Laws."

"Count 3 charges that the defendants, Constant G. Tuffanelli, Stephen Ostrowski, Jr., and Walter J. Bonarski, unlawfully carried on the business of a wholesale liquor dealer without having paid the special tax, as required by law, and is based on a provision of the United States statute which provides that any person who shall carry on the business of a * * * wholesale liquor dealer * * * and wilfully fails to pay the special tax, as required by law,

"Section 1397a, U. S. C. A.

"Section 3253, Internal Revenue Laws. (R. 100-101.)"

Defendants' counsel objected to these slips on the ground that they should be in the language of the indictment; more particularly that the charges were that the petitioner did those things on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois. Over this objection, the Court sent these slips to the jury during their deliberations. The petitioner contends that these slips constitute a material amendment of Counts 1, 2 and 3 of the indictment and, hence, voids the entire indictment.

The foregoing, counsel believe, fairly represents all the facts that should be called to this Court's attention in connection with this petition.

The Circuit Court of Appeals affirmed the judgment of the trial court as to the petitioner on the substantive counts numbered 1 and 2, and the conspiracy count numbered 10. It reversed the judgment as to the petitioner on substantive counts numbered 3, 7 and 8. It affirmed the judgment as to the defendant, Bonarski, on substantive count number 7, and the conspiracy count, number 10, and reversed the judgment as to the defendant, Bonarski, on substantive counts 3 and 8. (R. 150.) The reason for reversing the judgment on Count 3 as to both Tuffanelli and Bonarski was that there was a fatal variance between the indictment which charged the defendants with being wholesalers at 2332 West Grove Avenue, Blue Island, Illinois, whereas the evidence showed the place of business was elsewhere. (R. 146-147.) The judgment was reversed as to the petitioner on Counts 7 and 8 and, as to the defendant, Bonarski, on Count 8 because there was no evidence to justify a verdict of guilty against them on those Counts. (R. 148.)

An opinion was filed by one of the Justices of the Circuit Court of Appeals, concurring in part and dissenting in part. He favored affirmance as to the conspiracy count only; as to the substantive counts, he thought the judgment should be reversed on the ground of misjoinder. (R. 151.)

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In failing to hold that the misjoinder of defendants, when first discovered at the trial, was prejudicial error.

2. In holding that the said misjoinder of defendants was not prejudicial.

3. In failing to hold that the petitioner who was never present at the still located at 2332 West Grove Avenue, Blue Island, Illinois, and who was only associated therewith by some showing of interest therein, was not a distiller, particularly since there was no evidence that distilled spirits were manufactured on the premises, that materials for the manufacture of distilled spirits were found thereon or that sales of distilled spirits were made at or from the premises.

4. In failing to hold that the written instructions of the trial court to the jury, purporting to describe the charges in the indictment but which omitted material allegations thereof, constituted a fatal amendment of the indictment.

Reasons for Granting the Writ.

1. *The petitioner was prejudiced by the failure of the trial court to order a dismissal of the substantive grounds on the ground that the evidence disclosed that the several defendants had been indicted for substantive offenses committed by them independently of each other.*

With respect to this point, the Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

If the indictment had truthfully charged the several defendants with the crimes, for which the government respec-

tively produced, or attempted to produce, evidence, the indictment would have charged only Tuffanelli with committing the crimes set forth in Counts 1 and 2, Bonarski, Ostrowski and Ptaszynski with the crime charged in Count 3, Bonarski and Ostrowski with the crimes charged in Count 7, and Ostrowski with Count 8. But, if the government had so charged the several defendants in the indictment, it would have been subjected to the principle set forth in the case of *McElroy* v. *United States,* 164 U. S. 76, 80, 17 S. Ct. 31, 32, 41 L. Ed. 355.

The existence of this objectionable situation came to light on the trial of the case for the first time and, at the first opportunity, at the close of the government's case, defendants' counsel pointed the same out to the trial court and asked first, for a directed verdict, and second, for a rule on the government to make an election of the count or counts on which it would proceed. The motion for a directed verdict was renewed at the close of all of the evidence. (R. 98, 99.)

This particular phase of the matter has never been decided by this Court. The Circuit Court of Appeals for the 7th Circuit, in the instant case of United States *vs.* Tuffanelli, has held that this misjoinder, so discovered for the first time at the trial, is not prejudicial or reversible error. This decision is in conflict with an earlier decision on the same subject matter rendered by the same Court, the Circuit Court of Appeals for the 7th Circuit, in 1912, in the case of *Brimie* v. *United States,* 200 F. 726.

The Circuit Court of Appeals for the 3rd Circuit, in the case of *United States* v. *Perlstein,* 120 F. (2) 276, held otherwise, as did the Circuit Court of Appeals for the 8th Circuit in the case of *Coco* v. *United States,* 289 F. 33.

It therefore appears that there is a confusion of opinions in the Circuit Court of Appeals for the 7th Circuit and the instant opinion is in conflict with the opinions of

two other Circuit Courts of Appeals, and presents a question which should be settled by this Court.

2. *The petitioner was prejudiced by being joined as a conspirator in an unusual and conflicting charge of conspiracy.* Count 10 of the indictment charges the petitioner and other defendants with conspiring with each other and with unknown persons to commit "the offenses charged against the said defendants in the preceding counts."

In affirming the conviction as to the petitioner on the conspiracy count, the Circuit Court of Appeals said: "to support the verdict as to the conspiracy count, it is sufficient if it is proved that Tuffanelli and one other defendant had conspired to commit the crimes alleged in Counts 1 and 2 * * *." The trial court dismissed the charges against the other defendants as to those counts.

No association of any defendant or conspirator, named or unnamed, with Tuffanelli, and no aiding or abetting Tuffanelli by any person whomsoever, with respect to the commission of the offenses set forth in Counts 1 and 2 is disclosed by the evidence. Tuffanelli stands alone as the only person named or mentioned, at the trial, who had any connection, however remote that connection may have been, with the still seized at 2332 West Grove Avenue. If the defendants had been charged, only with conspiring to commit the crimes set forth in Counts 1 and 2, no conviction could have been obtained, since only one person was involved in those crimes, according to the evidence.

The substantive Count 3, charging the defendants with being distillers of distilled spirits was reversed because of a fatal variance and, hence, a charge of conspiring to commit that substantive offense must also fail because of the fatal variance between the allegations in the indictment and the proof.

The Circuit Court of Appeals held that there was no evi-

dence to convict the petitioner with the crimes charged in Counts 7 and 8. (R. 148.)

The question is now presented whether the petitioner could be convicted in a single Count charging a conspiracy to commit five substantive crimes where, if he were charged with five individual and separate conspiracies, each devoted to a single substantive count, he would be acquitted of each charge.

This question was decided adversely to the petitioner by the Circuit Court of Appeals for the 7th Circuit.

An important point of law of first impression, should be decided by this Court particularly since it seems that this unusual method of pleading the crime of conspiracy is becoming popular with a number of District Attorneys.

3. *There was such an absence of evidence upon which to convict the petitioner of carrying on the business of distiller of alcoholic spirits, at 2332 West Grove Avenue, Blue Island, Illinois, without having given a bond, as charged in Count 2, that the conviction of the petitioner thereof, the sentence of the trial court thereon, and the affirmance thereof by the Circuit Court of Appeals result in depriving the petitioner of his liberty without due process of law, and requires the intervention of this Court to prevent such miscarriage of justice.*

4. *The petitioner is prejudiced by an illegal amendment of the indictment by the trial court.* This point was dismissed by the Circuit Court of Appeals with the comment that it was without merit. (R. 150.) Counts 1, 2 and 3 charged the defendants, on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, with, respectively, possessing a set-up still, with carrying on the business of a distiller, and with carrying on the business of a wholesale liquor dealer, under such circumstances that they violated the law. The slips of paper, or *written* instructions,

of the trial court, delivered physically to the jury, purported to describe these three charges but left out the date on which the crimes were committed and the place where the same were alleged to have been committed, both of which allegations were set forth in the indictment. The Circuit Court of Appeals for the 7th Circuit, in its instant opinion, held that where an indictment specifically describes the premises on which the crime is alleged to have been committed, the description becomes a matter of substance and must be proved as alleged. (R. 147.)

If the slips of paper, or written instructions, constitute an amendment of the indictment, then a case of first impression is presented to this Court. In the case of *Ex Parte Bain,* 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849, *Naftzer* v. *U. S.* (C. C. A. 8), 200 F. 494, and *Stewart* v. *U. S.,* 12 F. (2) 524, material allegations of an indictment *were stricken on the motion* of the Government, and in each such case, the ruling of the court was held to be an illegal amendment of the indictment and in violation of the Fifth Amendment to the Constitution of the United States of America, which declares that "no person shall be held to answer * * * for an infamous crime, unless upon a presentment or indictment of a grand jury."

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 25, 1943.